No. 12,373

IN THE

United States Court of Appeals

For the Ninth Circuit

JOHN STOPPELLI,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S PETITION FOR A REHEARING.

J. W. EHRLICH,
512 De Young Building, San Francisco 4,
Attorney for Appellant and Petitioner.

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To the Honorable William Denman, Chief Judge, and to the Honorable Associate Judges of the United States Court of Appeals for the Ninth Circuit:

The opinion of the court does away with the rule of reasonable doubt.

The majority opinion in dealing with weight of the evidence professes at first to follow the instructions of the lower court on the question of reasonable doubt, which were admittedly correct.

However, in reaching a final conclusion the majority opinion abandons the doctrine of reasonable doubt when it says:

> "We are not able to conclude as a matter of law that the jury, pursuant to the court's instructions, could not reasonably draw the inference of guilt from the fingerprint evidence."

The fallacy of the majority opinion is clear when it says that it cannot conclude that the jury "could not reasonably draw an inference of guilt from the fingerprint evidence." This is a misstatement of the law. Such statement of the rule does away with the doctrine of reasonable doubt. The converse is true; the question is—has the jury resolved every reasonable doubt in favor of the defendant?

The majority opinion justifies the verdict of the jury if there is any theory upon which the defendant can be found guilty. In other words, it is no longer a question whether there is a reasonable doubt of the defendant's guilt.

Applying the rule that any reasonable doubt must be resolved in favor of the defendant, the verdict of the jury has nothing but suspicion and assumption to support it. The Government's fingerprint expert became an expert on other matters. He became an expert on what was in an envelope at a previous date and said it was a powdery substance. On what scientific knowledge is this expert opinion based? If such a science exists, it is not shown. Only an anxious witness can be so proficient.

While an appellate court does not try the facts, we do ask the court to look at the evidence to see if there

is a reasonable hypothesis on which the defendant's innocence can rest. The majority has taken the position that it will not reverse a case unless it feels that "the jury could not reasonably draw an inference of guilt." If this rule is to stand, the doctrine of reasonable doubt is completely destroyed because in every case there is some evidence from which guilt can possibly be inferred.

The rule which this court has set up is contrary to the decisions of the Supreme Court of the United States. The only decisions cited in the majority opinion are civil cases involving actions for personal injuries. The rule in such cases has no application to a criminal case, where all reasonable doubts must be resolved in favor of the defendant.

The majority opinion piles inference on top of assumption in order to reach an inference of guilt. We inquire of this court—why is it necessary to assume that there was heroin in the envelopes when the fingerprint of Stoppelli was placed thereon? The Government expert, willing and anxious as he was to convict the defendant, did not say that the print could not have been caused without a powdery substance being therein. In our briefs we called attention to the fact that many substances could, as a matter of physical science (of which this court can take judicial knowledge) form the basis for the implanting of the fingerprint. We referred to the fact that a bunch of envelopes as they are found in a store could have formed the same base for the fingerprint.

The majority opinion has adopted the assumptions of a biased and prejudiced witness, to-wit, the assumption that there was a powdery substance in the envelopes. This court has not in any way pointed out how the conclusion of the Government witness that there was a powdery substance in the envelope is anything more than the assuming of a needed fact in a chain of circumstantial evidence. In other words, the Government witness assumes facts, which are not necessarily true as a matter of scientific knowledge or evidence, to create an inference of guilt. The majority opinion goes further and changes the powdery substance to heroin.

The majority opinion reflects (p. 3) that the record herein was quickly read and not sufficiently studied. The opinion reads:

> "Stoppelli might have had powdered sugar in the envelope to feed his pet canary. But in that event, how did it get into the package of heroin?"

How did what get into the package of heroin? The fingerprint? There was no one package. There were twelve (12) open letter envelopes, in which twelve (12) there were twelve (12) other sealed cellophane envelopes containing heroin.

There is no evidence that Stoppelli was ever near the letter envelopes when they were filled with heroin. The record (pp. 205-13) shows the heroin came to California in bulk and not in envelopes.

We agree that substance must control the decision of this court. But we inquire what substance? Guess-

ing? Conjecture? The filling in of the missing link in a one link chain of circumstantial evidence?

The true administration of criminal justice needs self-restraint on the part of the reviewing court. Restraint from concluding that "a powdery substance" is heroin.

As the majority opinion says:

> "No doubt, flights of fancy, to infer innocent possession, could be indulged in."

Is it not equally "flights of fancy" to infer that "a powdery substance" must be heroin?

THE MAJORITY OPINION ON THE QUESTION OF VENUE IS BASED UPON AN ERRONEOUS UNDERSTANDING OF THE FACTS.

The opinion reads:

> "The venue point is without merit in view of the provisions of 18 USC 3237."

That section sets forth the rule for venue when an offense is commenced in one district and completed in another.

The court in citing that section lost sight of the fact that the trial judge held there was insufficient evidence to show a conspiracy between Mr. Stoppelli and the other defendants found in Oakland, California, granting a new trial on that count. There is no evidence that Stoppelli was ever in Oaklond. Therefore, this case comes before this court for its consideration

without the conspiracy count before it. Without the conspiracy count before it there is nothing to show that Mr. Stoppelli committed any offense in more than one district, to-wit, New York. There is no showing that he delivered narcotics in or to California. In fact, the evidence as quoted in the majority opinion states that one Tony Sapoli brought heroin from New York to California. This section is without the remotest application to the case at bar and the majority opinion is without foundation. *Killian v. U. S.*, C.A.D.C. 29 F. (2d) 455 furnishes no authority for the majority opinion. That decision, if construed to support the majority decision, is contrary to *Casey v. U. S.*, 20 F. (2d) 752, 276 U.S. 413.

It appears that the majority has not considered the opinion of the Supreme Court in *Casey v. U. S.*, in connection with this case because its citation of that code section indicates that it has misunderstood the facts in the case at bar.

The question of venue is a very substantial one because the defendant was convicted of a conspiracy. A reading of the record shows that there was not the slightest evidence of conspiracy. The jury, therefore, convicted Mr. Stoppelli on bias and prejudice because of the joint trial with other defendants.

A trial of Mr. Stoppelli in the proper court without the other defendants would give him a fair trial, and that is what the Constitution of the United States guarantees to him.

CONCLUSION.

To maintain this decision you must destroy the requirement of proof beyond a reasonable doubt. You must destroy the presumption of innocence and permit and direct that the Government's burden of proof in a criminal case shall be no more than creating a vehicle from which a jury may pick any guess it pleases.

The narcotic traffic is a deadly business, but the rights of an individual cannot be sacrificed because narcotics are involved in the issue.

Dated, San Francisco,
July 21, 1950.

Respectfully submitted,
J. W. EHRLICH,
Attorney for Appellant and Petitioner.

Certificate of Counsel.

I hereby certify that I am of counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco,
July 21, 1950.

J. W. Ehrlich,
Of Counsel for Appellant and Petitioner.